

Amendments to the Tax Law Related to Sales of Cigarettes on Indian Reservations Beginning September 1, 2010

Chapter 134 of the Laws of 2010 amended the Tax Law related to sales of cigarettes on Indian reservations. As a result, beginning September 1, 2010, wholesale dealers are required to collect the cigarette excise tax and the prepaid sales tax for all cigarettes sold for resale on an Indian reservation to non-Indians and non-members of an *Indian nation or tribe*¹. Chapter 134 also provides a dual system to ensure that there is an adequate quantity of tax-exempt cigarettes available for the use or consumption of the nation or tribe and its members. This TSB-M explains how the amended provisions of the Tax Law and related regulations (20 NYCRR, section 74.6) will be implemented. These amended provisions apply to every wholesale dealer, including a wholesale dealer that is a licensed cigarette stamping agent.

The amended Tax Law and regulations provide two alternatives for Indian nations and tribes and their members to obtain tax-exempt cigarettes. The governing body of an Indian nation or tribe may elect to participate in the *Indian tax exemption coupon system*. If the coupon election is not made, the *prior approval system* will be used. Under both systems, the quantity of tax-exempt cigarettes will be determined based upon the probable demand of the *qualified Indians*² on the Indian nation's or tribe's *qualified reservation*³, plus an amount needed for official nation or tribal use.

To enforce the collection of the cigarette excise tax and prepaid sales tax, all packs of cigarettes sold by wholesale dealers to Indian nations and tribes and *reservation cigarette sellers*⁴ on or after September 1, 2010, must have New York cigarette tax stamps affixed to them. Any packs of cigarettes transported to a qualified reservation on or after September 1, 2010, must have cigarette stamps affixed regardless of the invoice date.

Wholesale dealers may sell stamped packs of cigarettes to Indian nations and tribes and reservation cigarette sellers exempt from tax to the extent Indian tax exemption coupons are provided or to the extent prior approval is received from the Tax Department. Since all packs of cigarettes must bear a cigarette tax stamp, wholesale dealers may claim an expedited refund for the cigarette excise tax and prepaid sales tax associated with these tax-exempt sales.

Any agent or wholesale dealer that sells unstamped or unlawfully stamped cigarettes for use or resale on a qualified reservation will be subject to an assessment for tax, interest, and civil penalties; may have its license cancelled or suspended; and may be subject to criminal penalties.

Probable demand

Probable demand will be determined by reference to, among other data, the United States average cigarette consumption per capita, as compiled for the most recently completed calendar

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or fiscal year, multiplied by the number of qualified Indians for each of the Indian nations and tribes. (For more details, see 20 NYCRR, section 74.6.) Except for the initial period described below, each June, the Tax Department will determine the annual amount of stamped tax-exempt packs of cigarettes for each of the Indian nations or tribes for the next 12-month period beginning September 1 and ending August 31. The annual amount will then be prorated to each of the four quarters beginning with the first day of September, December, March, and June. In making the annual determination of probable demand, the Tax Department will consider any evidence submitted by the recognized governing body of an Indian nation or tribe relating to probable demand (for example, a verifiable record of previous sales to qualified Indians or other statistical evidence) and/or relating to the amount needed for the nation's or tribe's official use that is submitted to the Tax Department by **July 31** each year. All evidence must be submitted in writing and mailed to:

NYS Tax Department
Office of Tax Policy Analysis
W A Harriman Campus
Albany NY 12227

The initial quarterly amounts of stamped tax-exempt packs of cigarettes for each of the Indian nations or tribes are shown in the following table for the 12-month period beginning September 1, 2010. However, the Tax Department may adjust these amounts based on evidence submitted in relation to probable demand as described above.

Indian tax-exempt cigarettes for quarters occurring September 1, 2010 - August 31, 2011*

Indian nation or tribe	NYS population (2000 census)	Quarterly cigarette amount (packs)
Cayuga	947	20,100
Oneida	1,473	31,200
Onondaga	2,866	60,600
Poospatuck (Unkechauge)	376	8,100
Seneca (Allegany, Cattaraugus, Oil Springs)	7,967	168,600
Shinnecock	1,915	40,500
St. Regis Mohawk	13,784	291,600
Tonawanda Band of Senecas	256	5,700
Tuscarora	1,025	21,900

(*See 20 NYCRR, section 74.6(e).)

Indian tax exemption coupon system

Election by Indian nations and tribes

To ensure an adequate quantity of cigarettes on its qualified reservation that may be purchased by an Indian nation or tribe or by its members for their use or consumption exempt from the tax, the recognized governing body of an Indian nation or tribe may annually elect to participate in the Indian tax exemption coupon system. The election must be made by **August 15** each year and applies to the following 12-month period beginning September 1 and ending August 31. If a timely election is made, the Tax Department will provide Indian tax exemption coupons to the governing body of the Indian nation or tribe on a quarterly basis in advance of each quarter beginning with the first day of September, December, March, and June. If a timely election is not made, no coupons will be provided to the Indian nation or tribe for that 12-month period. Instead, the prior approval system described below will be used to ensure there is an adequate quantity of stamped tax-exempt cigarettes available for the use and consumption of the Indian nation or tribe and its members.

The governing body of an Indian nation or tribe must elect to participate in the Indian tax exemption coupon system by writing to:

NYS Tax Department
TDAB FACCTS – Cigarette Tax Unit
W A Harriman Campus
Albany NY 12227

The election must include the name and title of the person making the election and a statement indicating that the person is the federally recognized representative of the Indian nation or tribe (if applicable) and is duly authorized to bind the nation or tribe making the election. A contact name, address, phone number, and E-mail address should also be provided to allow for follow up communications.

When making the election, the governing body of the Indian nation or tribe must contact the Tax Department to make arrangements for the delivery of Indian tax exemption coupons either by including instructions with the written election or by calling the Cigarette Tax Unit at (518) 457-0432, Monday – Friday, between the hours of 9:00 AM and 5:00 PM.

Once the election is made, the Tax Department will provide Indian tax exemption coupons (Form MT-215) to the recognized governing body of each Indian nation or tribe as described above. It is anticipated that each recognized governing body will retain the amount of coupons it will need to purchase cigarettes for official nation or tribal use and distribute the remaining Indian tax exemption coupons to reservation cigarette sellers on the nation's or tribe's

qualified reservation(s). The Tax Department will not distribute Indian tax exemption coupons directly to reservation cigarette sellers.

Redemption of Indian tax exemption coupons

When the coupon system is in effect, an Indian nation or tribe may purchase stamped packs of cigarettes for its own official use or consumption from a wholesale dealer licensed under Tax Law Article 20 without paying the cigarette excise and prepaid sales taxes to the extent that the Indian nation or tribe provides the wholesale dealer with Indian tax exemption coupons.

A reservation cigarette seller may purchase cigarettes for resale from a wholesale dealer without paying the cigarette excise and prepaid sales taxes, provided that:

- The reservation cigarette seller brings the cigarettes or arranges for their delivery onto a qualified reservation for resale on that reservation;
- the reservation cigarette seller provides the wholesale dealer with Indian tax exemption coupons entitling the reservation cigarette seller to purchase the quantities of cigarettes allowed for on each Indian tax exemption coupon; and
- the packs of such cigarettes are affixed with New York cigarette tax stamps.

Coupon instructions for wholesale dealers

Each Indian tax exemption coupon consists of a redemption portion (Part I) for a wholesale dealer's submission to the Tax Department when claiming a refund, and a retention portion (Part II) for a wholesale dealer's record-keeping purposes. Each coupon contains the following pre-printed information:

- the identity of the Indian nation or tribe to which it is issued;
- the quantity of cartons of stamped packs of cigarettes for which it is issued;
- the valid only date by which the coupon must be redeemed; and
- an assigned coupon number.

The wholesale dealer must complete both Part I and Part II of the coupon and submit Part I with the wholesaler's name, the customer's name, date received, and date submitted when claiming a refund. (See *Refunds* on page 6 for more information.)

Coupon expiration date

Since the election must be made annually, coupons are valid only during the 12-month period covered by the coupon election. Coupons for each quarter will expire on August 31 each year and may not be accepted for sales after the expiration date.

Prior approval system to be used by wholesale dealers

If the governing body of an Indian nation or tribe does not elect to participate in the Indian tax exemption coupon system by August 15, no Indian tax exemption coupons will be provided to that Indian nation or tribe for that year. Instead, the prior approval system will be used to ensure there is an adequate quantity of stamped tax-exempt cigarettes available for the use and consumption of the Indian nation or tribe and its members. As with the coupon system, an Indian nation or tribe or a reservation cigarette seller may purchase tax-exempt packs of cigarettes from a wholesale dealer based on the probable demand of the Indian nation or tribe and its members as determined and pre-approved by the Tax Department.

Under this system, wholesale dealers must obtain approval from the Tax Department prior to making any tax-exempt sales of cigarettes to an Indian nation or tribe or its reservation cigarette sellers. All pre-approved packs of tax-exempt cigarettes must bear a tax stamp and must be brought or delivered onto a qualified reservation for use or resale on that reservation.

Online services account needed for prior approval system

To obtain prior approvals for tax-exempt sales to Indian nations and tribes and reservation cigarette sellers, wholesale dealers must use the *View/Report Indian Tax-Exempt Cigarette Sales* system provided through the *Online Services* link on the Tax Department's Web site (www.nystax.gov). Wholesale dealers that do not already have an online services account must establish one by following the instructions provided on the department's Web site. The Tax Department will also provide wholesale dealers with instructions for creating an online services account in a separate mailing.

Prior approval and reporting for Indian tax-exempt cigarette sales

The following is a general description of how wholesale dealers should obtain prior approvals using the *View/Report Indian Tax-Exempt Cigarette Sales* system. Specific instructions and updates will be provided online by September 1, 2010.

At the beginning of each quarter, the system will display the available quantities of tax-exempt cigarettes related to Indian nations and tribes that have not elected to participate in the Indian tax exemption coupon system. As with the coupon system, the initial quantities displayed will be the quarterly amounts based on the probable demand of that Indian nation or tribe (see table on page 2). For any Indian nation or tribe that has elected to use the coupon system, the amount shown will be zero.

Upon receipt of a purchase request from an Indian nation or tribe or reservation cigarette seller, a wholesale dealer must sign in and check the system to determine the available cartons of stamped tax-exempt packs of cigarettes that may be sold in relation to that Indian nation or tribe.

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If there is an adequate quantity available, the dealer should enter the number of cartons of cigarettes to be sold to the Indian nation or tribe or reservation cigarette seller. Upon submitting the request, the remaining quantity available will be reduced by the amount requested and an authorization number for the sale will be generated.

To ensure that the authorized cigarettes are sold tax-exempt to an Indian nation or tribe or reservation cigarette seller, the system requires that wholesale dealers report the quantity actually sold, the name and address of each purchaser, and the invoice number for each sale within 48 hours of receiving the authorization number. If the total approved quantity is sold to several purchasers, each sale must be reported individually. Upon reporting the sale(s), wholesale dealers will receive a confirmation number to be used when claiming a refund for the applicable taxes prepaid because cigarette tax stamps were affixed. (See *Refunds* below for more information.)

If a prior approved sale is not reported or the full quantity requested is not sold within 48 hours of receiving the authorization number, the balance of the quantity not reported as sold will be added back to the quantity available for Indian tax-exempt sales. Cigarettes not sold within 48 hours may not be sold tax-exempt under the expired authorization number. Wholesale dealers will be liable for any taxes due on cigarettes sold but not reported within 48 hours of receiving an authorization confirmation number for the sale.

Carryover of unused Indian tax-exempt cigarettes

The remaining balance of any Indian tax-exempt cigarettes not sold during the quarter will be added to the cigarettes available for sale in the next quarter. However, if there is a remaining balance of Indian tax-exempt cigarettes on August 31, that balance may not be carried over to the following 12-month period beginning September 1.

Refunds

Wholesale dealers may file a claim for an expedited refund for any cigarette excise tax and prepaid sales tax paid on stamped packs of cigarettes they sold without collecting the taxes because they accepted Indian tax exemption coupon(s) from the purchaser or they received prior approval from the Tax Department to make the sale, and the cigarettes were brought or delivered to the purchaser's qualified reservation. (Since there are no qualified reservations located within New York City, joint city/state cigarette tax stamps may not be used for reservation sales. Thus, an expedited refund is not permitted for packs of cigarettes with joint city/state stamps.)

Wholesale dealers may claim refunds for Indian tax-exempt sales on Form CG-114-E, *Expedited Claim for Refund for Indian Tax-exempt Cigarette Sales*. When claiming a refund based on the acceptance of Indian tax exemption coupons, the redemption portion (Part I) of the

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coupon(s) must be submitted with Form CG-114-E. For a refund based on sales made under the prior approval system, the reporting confirmation number must be shown on Form CG-114-E. When applying for a refund, a licensed wholesale dealer who is also a licensed cigarette stamping agent is not required to deduct the commissions that were received. Form CG-114-E will be available on the Tax Department's Web site at www.nystax.gov by September 1, 2010.

Tax agreements

If an Indian nation or tribe enters into an agreement with New York State, the terms of the agreement will take precedence over either the coupon system or the prior approval system. Sales to non-Indians by the Indian nation and to non-members of the nation or tribe will be exempt from tax to the extent that the taxes are specifically referred to in the agreement, and the sale or distribution, including transportation, of any cigarettes to the nation's or tribe's qualified reservation will be in accordance with the provisions of the agreement. The Tax Department will provide separate notification in the event a tax agreement is reached with an Indian nation or tribe.

Individual Indian exemption form not applicable

A wholesale dealer may only sell tax-exempt stamped packs of cigarettes to an Indian nation or tribe or reservation cigarette seller when the provisions of the Indian tax exemption coupon system, the prior approval system, or a tax agreement have been met. Form DTF-801, *Certificate of Individual Indian Exemption for Certain Property or Services Delivered on a Reservation*, may not be accepted for sales of cigarettes.

Forms and instructions

Form CG-5, *Nonresident Agent Cigarette Tax Report*, and Form CG-6, *Resident Agent Cigarette Tax Report*, along with several applicable schedules will be revised to incorporate these new provisions and will be mailed to agents to replace the current forms. All new and revised forms will also be available on the Tax Department's Web site at www.nystax.gov.

Definitions

¹ An *Indian nation or tribe* is defined to mean one of the following New York State Indian nations or tribes: Cayuga Indian Nation of New York, Oneida Indian Nation of New York, Onondaga Nation of Indians, Poospatuck or Unkechauge Nation, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock Tribe, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

² The term *qualified Indian* means a person duly enrolled on the tribal rolls of one of the Indian nations or tribes. In the case of the Cayuga Indian nation of New York, such term shall include enrolled members of such nation when such enrolled members purchase cigarettes on any Seneca reservation.

³ The term *qualified reservation* means (a) lands held by an Indian nation or tribe that are located within the reservation of that nation or tribe in the state; (b) lands within the state over which an Indian nation or tribe exercises governmental power and that are either (i) held by the Indian nation or tribe subject to restrictions by the United States against alienation, or (ii) held in trust by the United States for the benefit of such Indian nation or tribe; (c) lands held by the Shinnecock Tribe or the Poospatuck (Unkechaug) Nation within their respective reservations, or (d) any land that falls within category (a) or (b) and which may be sold and replaced with other land in accordance with an Indian nation's or tribe's land claims settlement agreement with the state of New York, shall nevertheless be deemed to be subject to restriction by the United States against alienation.

⁴ A *reservation cigarette seller* means a seller of cigarettes that is an Indian nation or tribe, one or more members of such tribe, or an entity wholly owned by either or both, that sells cigarettes within the boundaries of a qualified reservation.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.